IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Supreme Court, U. S.
FILED
JUL 17 1978
MICHAEL RODAK, JR., CLERK

No. 77-1690

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT INTERNATIONAL BUSINESS MACHINES CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

In a rulemaking proceeding, after three rounds of written comments and extensive petitions for reconsideration involving at least 43 parties, the Federal Communications Commission ("Commission") ruled that telephone common carriers should not be allowed to prohibit the resale or sharing of their transmission services. The questions presented are:

1. Was it unlawful for the Commission to issue this ruling without conducting trial-type hearings?

2. Was the Commission's ruling arbitrary, capricious, or an abuse of discretion?

STATEMENT OF THE CASE

The case is described in IBM's petition for certiorari in No. 77-1540. Briefly, the Commission engaged in rulemaking to decide whether to permit the creation of a new class of entities in the telephone industry—"resellers," who would buy private line telephone transmission services from telephone companies and resell them to the public, but would not themselves operate transmission facilities. Such resale activity had previously been barred by provisions in telephone company tariffs. After three years of proceedings, the Commission ruled that the public interest would be served by putting an end to those prohibitions.[1]

The Commission gave interested parties ample opportunity to express their views in the rulemaking proceeding. It invited and received three rounds of written comments, which ultimately totaled more than 4,300 pages. AT&T participated at each stage, as one of at least 43 parties.

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[1] In starting the proceeding, the Commission noted that a second issue was also presented: whether, if resale was allowed, it would be desirable to regulate resellers as common carriers. *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Notice of Inquiry and Proposed Rulemaking*, 47 F.C.C.2d 644, 656-57 (1974).

However, the Commission in effect failed to decide that issue. It ruled that it is legally compelled to regulate resellers, because it believes they fall within the definition of "common carrier" in the Communications Act, 47 U.S.C. § 153(h). The Commission thus did not decide whether such regulation would be in the public interest. The Commission's legal error in holding that it must regulate resellers is the subject of IBM's petition for certiorari in No. 77-1540.

After considering the three rounds of comments, the Commission issued its *Initial Order*, declaring that telephone companies providing private line services may no longer restrict the resale or sharing of those services.[2] AT&T and other parties then filed extensive petitions for reconsideration. After considering those petitions, the Commission released an *Order on Reconsideration*, which reaffirmed the principal conclusions of the *Initial Order* but modified that order in respects not here relevant.[3]

AT&T and others sought review of the Commission's orders in the United States Court of Appeals for the Second Circuit. That court affirmed the orders in all respects.[4]

ARGUMENT

A. The Questions Raised by AT&T's Cross-Petition Are Insubstantial.

AT&T seeks a writ of certiorari to argue that the Commission's notice and comment rulemaking procedure was inadequate. AT&T asserts that the Commission, besides considering the extensive written comments, was required to hold a trial-type evidentiary hearing. AT&T further suggests that the Commission's decision is arbitrary and capricious because the record did not enable the Commission to predict with certainty the future consequences of its orders. As the court below held, those arguments are foreclosed by well-settled law. This Court has recently and frequently rejected the positions AT&T seeks to argue.

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[2] *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261 (1976), App. B to IBM's petition for certiorari in No. 77-1540.

[3] 62 F.C.C.2d 588 (1977), App. C to IBM's petition for certiorari in No. 77-1540.

[4] App. A to IBM's petition for certiorari in No. 77-1540.

The notice and comment rulemaking procedure used by the Commission was correct under the Administrative Procedure Act ("APA")[5] and the Communications Act.[6] The APA establishes notice and comment as the normal procedure in a rulemaking, and requires a trial-type hearing only where another statute specifically requires a decision to be made "on the record." *United States* v. *Florida East Coast Railway*, 410 U.S. 224 (1973). Because Section 205 (a) of the Communications Act contains no such requirement,[7] this case does not come within the APA's narrow exception to normal rulemaking procedures.

Moreover, the notice and comment procedure is particularly appropriate for rulemakings, such as this one, in which an agency formulates new policies of prospective, industry-wide application. The Commission here was considering a broad policy issue, whether to authorize the creation of a new class of entities that would act as intermediaries between telephone companies and consumers. Its orders, which are prospective only, apply to *all* communications carriers offering any type of private line services. And the issues of "legislative" fact that were before the Commission—which involved predicting the future effects of resale on the development of telecommunications[8]—were unsuited to a trial-type hearing.[9] "[T]he very basic tenet of administrative law that agencies should be free to fashion their own rules of proce-

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[5] *See* 5 U.S.C. § 553(c).

[6] *See* 47 U.S.C. § 205(a).

[7] Section 205(a) requires only that the Commission act "after full opportunity for hearing." 47 U.S.C. § 205(a).

[8] *See Initial Order*, 60 F.C.C.2d at 298-303, 272-74, App. B at 68b-76b, 21b-25b.

[9] *See, e.g., Bell Telephone Co.* v. *FCC*, 503 F.2d 1250, 1268 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975); *American Airlines, Inc.* v. *CAB*, 359 F.2d 624, 633 (D.C. Cir.) (*en banc*), *cert. denied*, 385 U.S. 843 (1966).

dure" [10] supports the Commission's choice of a notice and comment procedure here.

Nor can the Commission's orders be found to be "arbitrary, capricious, [or] an abuse of discretion," the controlling standard under the APA.[11] The Commission's orders amply discuss the factors relevant to its decision and articulate a rational connection between the facts found and the choices it made.[12] To require the Commission to determine with certainty how its new policies will work would produce, in Judge Friendly's words,

> "an unhappy state of affairs wherein efforts by parties, agencies, and courts to attain an unattainable certainty result in such giant delays as to produce the worst of all possible worlds." [13]

This Court recently noted that, if agencies were required to support their rules with "the type of record produced only after a full adjudicatory hearing," they would be forced always to hold such hearings and "all the inherent advantages of informal rulemaking would be totally lost." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 46 U.S.L.W. 4301, 4308 (U.S. April 3, 1978). The Court reconfirmed that the APA imposes no such requirement.

The decision below merely applied these settled principles to the facts of this case. AT&T's challenge to that decision raises no issue worthy of review in this Court.

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[10] *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 46 U.S.L.W. 4301, 4307 (U.S. April 3, 1978).

[11] 5 U.S.C. § 706(2)(A); *see FCC* v. *National Citizens Committee for Broadcasting*, 46 U.S.L.W. 4609, 4616-20 (U.S. June 12, 1978).

[12] *See, e.g., Initial Order*, 60 F.C.C.2d at 280-85, 291-93, 298-303, App. B at 35b-45b, 55b-59b, 68b-76b; *Order on Reconsideration*, 62 F.C.C.2d at 592, 594-97, App. C at 9c, 12c-19c.

[13] *In re Penn Cent. Transp. Co.*, 384 F. Supp. 895, 931-32 n.72 (Spec. Ct. R.R.R.A. 1974).

B. AT&T's Procedural Arguments Are Unrelated to the Substantial Issues Raised by IBM's Petition.

The procedural issues AT&T seeks to raise are unrelated to the issues posed by IBM's petition in No. 77-1540. AT&T's arguments relate exclusively to the rulemaking procedure used by the Commission in deciding that resale should be permitted. As we have shown, those arguments do not merit review here. IBM's petition raises the entirely distinct question whether, assuming that resale is permitted, the Commission is compelled by law to regulate resellers as common carriers. A decision by the Court on that question would in no way implicate AT&T's procedural arguments. Should the Court decide to grant IBM's petition, there would still be no reason for it to review the insubstantial issues AT&T seeks to raise.

CONCLUSION

AT&T's conditional cross-petition for certiorari should be denied, regardless of the Court's disposition of IBM's petition for certiorari in No. 77-1540.

Respectfully submitted,

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